IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 912 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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ARVIND@ ANNO BHAILAL SOLANKI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS BANNA S DUTTA WITH ATIT THAKORE for Appellant(s) : 1,
MR RC KODEKAR, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 26/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal has been filed by the appellant-original accused against the judgment and order of conviction dated 8-9-1997 passed by the learned Addl. Sessions Judge, Baroda, in Sessions Case No.120 of 1995 sentencing the appellant to undergo imprisonment for life and to pay fine of Rs.3,000/- in default, to suffer imprisonment for one year under Sec.302 of IPC.
2. The case of the prosecution in short is that the complainant Ahsanbhai Nomanbhai Jinvala and deceased Kanubhai Chimanlal Parikh were partners of Roopan Cinema situated at Harni Road, Baroda. On 1-7-1995 at about 10.00 a.m., the deceased was sitting in his office of Roopam Cinema and the Booking Clerk Abdul Mahmad Shaikh was sitting outside his office. When said Abdul Mahmad entered into the office of deceased Kanubhai Chimanlal

Parikh, he found him in injured condition having upper portion of his body lying on the table. As said Abdul Mahmad was frightened, he left the cabin and went to the ground floor and informed Ahsanbhai, the partner of said Kanubhai and Sharadbhai Narayanrav Ahir, another Booking Clerk about the same and, therefore, they went to the office from where they took him to the hospital in an autorickshaw. While they were travelling in the rickshaw, as the injured was not able to speak, he informed them by sign about the assailant and, therefore, Ahsanbhai lodged the complaint before the police at hospital. The complaint was registered for the offences punishable under Secs.452, 392, 197, 307 of IPC. During the course of investigation, as the victim succumbed to the injuries, Sec.302 of IPC was added. As there was allegation regarding robbery of Rs.9,500/-, Secs.392 and 397 of IPC were also added. The investigating officer investigated the matter, drew

panchnama of scene of offence, recorded statements of various witnesses, collected evidence and sent it to FSL for analysis. As the victim succumbed to the injuries, inquest panchnama was drawn and also made arrangements for sending the body for post mortem. On arrival of post mortem report and FSL report, same were kept with the investigation papers. The accused was arrested and at the end of investigation, charge sheet was filed into the court below.

3. As the case against the accused was triable exclusively by the Sessions Court, court below committed the case into the Court of Sessions at Baroda where it was numbered as Sessions Case No.120 of 1995. The learned Sessions Judge framed charge against the accused. The accused appeared before the Court and pleaded not guilty to charge and prayed for trial.

4. To prove the guilt against the accused, prosecution examined Abdulbhai @ Karimbhai @

Mahmadbhai Shaikh, P.W.No.1 at Ex.10, the person serving in the Roopam Cinema as Booking Clerk and claimed to be the first person who went into the cabin of the victim and whom the deceased informed regarding the assailant by way of sign due to severe injury on his throat; Sharadbhai Narayanrav Ahir, P.W.No.2 Ex.11, another person serving in the said Talkies as Booking Clerk; Mahmoodmiya Allarakha Shaikh, P.W.No.3 Ex.12, who claimed to be an eye witness but did not support the say of prosecution and has been declared as hostile; Mahmadmiya Hussainmiya Jamadar P.W.No.4 Ex.13, who also claimed to be an eye witness having met the deceased after the incident but did not support the say of the prosecution and has been declared as hostile; B.K.Garasiya, P.W.No.5 Ex.14, duty Police Constable, who received vardi from Nandubhai Alambhai from the Government Hospital over phone and same was registered at Ex.15; Dushyantbhai

Manilal Solanki, P.W.No.6 Ex.16, who did not support the case of the prosecution and has been declared as hostile; Vikrambhai Somabhai Solanki, P.W.No.7 Ex.17, an employee of the Talkies who did not support the case of the prosecution and has been declared as hostile; Bachubhai Jatanbhai Rathwa, P.W.No.8 Ex.18, who was serving as Writer to PSI Shri Pawar of Panigate Police Station, Baroda, and who received vardi from Ahsanbhai Kanubhai Manilal Parikh from the hospital and who along with Shri Pawar went to the hospital and complaint of complainant Ahsanbhai was recorded; Jasvantsinh Ratansinh Vaghela, P.W.No.9 Ex.19, who was serving as PSO at Karelibaug Police Station and who registered the complaint sent by Shri Pawar as Karelibaug Police Station C.R.No.I-165 of 1995 initially under Secs.307 of IPC and Sec.135 of B.P.Act; Omkar Sohanlal Mali, P.W.No.10 Ex.24, the panch of weapon produced by the

accused but did not supported the say of the prosecution; Abdulrazak Rahimbhai, P.W.No.11 Ex.25, the panch of recovery panchnama and in whose presence Rs.7,000/- was produced by the accused and was seized but did not support the say of the prosecution; Sabbirhussain Abdulmajid Shaikh, P.W.No.12 Ex.26, the second panch of recovery panchnama; Ahsanbhai Nomanbhai Jinvala, P.W.No.13 Ex.28, the partner of Kanubhai Chimanbhai Parikh and the complainant in this case; Dr.Sunilkumar Mavjibhai Patel, P.W.No.14 Ex.29, Medical Officer who examined Kanubhai at SSG Hospital; Mukesh Kikabhai Brahmaxatriya, P.W.No.15 Ex.31, the panch of panchnama whereby weapon knife has been produced by accused; Dr.Pankaj Haridas Barai, P.W.No.16 Ex.32, doctor who performed post mortem of deceased Kanubhai; Dr.Uday Ramchandra Purandare, P.W.No.17 Ex.36, doctor who treated the victim at SSG Hospital in IC

Unit. Dipak Kanaiyalal Parikh, Ex.18 Ex.41, son of the deceased Kanubhai Kanaiyalal Parikh and not an eye witness; Nandubhai Alambhai, P.W.No.19 Ex.42, the person who informed Karelibaug Police Station over telephone about the incident; Kiritsinh Surubhai Zala, P.W.No.20 Ex.43, Police Inspector of Karelibaug Police Station before whom complaint was given by Ahsanbhai at Karelibaug Police Station and who, after registering the same, handed over further investigation to PSI Shri Pawar; Gulabrav Hiralal Pawar, P.W.21 Ex.44, PSI working at the relevant time at Karelibaug Police Station and who deposed categorically in his chief examination that Ahsanbhai Nomanbhai Jivanlal gave complaint before him. Prosecution also relied upon various documentary evidences namely, vardi Ex.15; inquest panchnama Ex.20, cloth of the deceased seized Ex.21; search of house of the accused Ex.22; certificate issued by

Dr.Sunilkumar Mavjibhai Patel Ex.30; certificate issued by Dr.Pankaj Haridas Barai regarding health of the deceased Ex.33; report of Bhailal Amin Hospital Ex.34 along with papers of said hospital Exs.37 and 38; certificates issued by said hospital Exs.39 and 40; panchnamas of scene of offence, arrest of accused and of muddamal seized Exs.45, 46 and 47 respectively as well as report received from Chemical Analyzer, FSL, and also post mortem report.

5. After completing oral as well as documentary evidence of the prosecution and accepting the closing purshis filed by the prosecution, the learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua the incriminating evidence established during the course of trial. The accused did not step into the witness box nor did he examine any witness. Therefore, learned Addl. Sessions Judge, Baroda, after giving

opportunity to the learned advocates appearing for the respective parties, convicted the accused for the offence under Sec.302 of IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs.3,000/-, in default, to undergo further imprisonment for one year, however, the accused was acquitted of all other charges by the impugned judgment and order.

6. We have heard the learned counsel for the appellant, Ms.Banna S.Dutta with Mr.Atit Thakore and learned APP, Mr.R.C.Kodekar, for the respondent-State.

7. Learned counsel for the respective parties have concentrated their arguments towards the witnesses who tried to support the say of the prosecution and who claimed to be the eye witnesses or the persons who reached the scene of offence at the earliest after the incident.

8. Our attention was drawn towards the evidence of P.W.No.1, Abdulbhai @ Sando Karimbai @

Mahmadbhai Shaikh at Ex.10. He has categorically deposed in his chief examination that he was the person who first went to the office of deceased Kanubhai where he found Kanubhai lying severely injured in a pool of blood. Since he could not control himself, he came out and sat down on the bench. At that time, this witness, deceased and Ahsanbhai were only present in the Talkies. He has further deposed that when he entered into the office of Kanubhai, he did not see anybody. He further deposed that he does not know about the incident but he admitted that police had recorded his statement. He has been declared as hostile by the prosecution and nothing has come out in his oral evidence to connect the accused with the crime in question.

9. Next witness relied upon by the learned counsel for the parties is of P.W.No.2, Sharadbhai Narayanrav Ahir at Ex.11. He was serving as Booking Clerk in the said

Talkies. He has deposed that Abdulbhai came to the ground floor and informed him as well as Ahsanbhai regarding the injury received by Kanubhai. Hence, all the three persons namely Ahsanbhai, Abdulbhai and this witness went into the office of Kanubhai from where Kanubhai informed them by sign that Safai Sevak has injured him. Thereafter, he went to the hospital along with Kanubhai from where also, Kanubhai informed him about the assailant by way of physical sign. He has identified the accused in the Court by stating that previously the accused was an employee of Roopam Cinema where he was serving as a Booking Clerk. It has come out in paragraph 8 of his cross examination that he and Ahsanbhai went to the hospital on scooter and one person namely Rasik went to the hospital along with Kanubhai in an autorickshaw. It is required to be noted that another witness who was also with him while entering into the office

of Kanubhai has not supported the say of the prosecution. According to him, Kanubhai was unable to speak as he was severely injured on his throat and vocal code. In these circumstances, evidence of Sharadbhai does not appear to be trustworthy because on relevant point, he is not telling the truth before the court as established from the evidence on record.

10. From the aforesaid deposition of Sharadbhai, learned counsel for the appellant submitted that witness Sharadbhai has no regards for truth as he tried to implicate the accused by stating that the victim from his cabin had informed him and Ahsanbhai by sign about the assailant and thereafter again at the time when he was taking Kanubhai into the hospital in autorickshaw. In his cross examination, it came out categorically that he never went to the hospital with Kanubhai in autorickshaw. So, we are of the opinion that his say regarding the incident cannot

be believed as submitted by learned counsel for the appellant.

11. The star witness according to the prosecution is prosecution witness No.13 Ahsanbhai Nomanbhai Jinvala who has been examined at Ex.28. It is worth noting that he has not deposed that Kanubhai was unable to speak. He has only deposed that Kanubhai has tried to inform him and other two persons about the name of the assailant by physical expression. His complaint has been noted down by PSI, Shri Pawar. PI, Shri Zala, who was examined by prosecution as P.W.No.20 at Ex.43 has categorically deposed that he registered the complaint given by Ahsanbhai Nomanbhai Jinvala at Karelibaug Police Station and handed it over to PSI, Shri Pawar of Panigate Police Station for further investigation. However, Shri Pawar who was examined as P.W.No.20 at Ex.44 has categorically deposed that he registered the complaint of Ahsanbhai.

12. From the above, there appears to be some material contradiction in the evidence of the independent witnesses regarding noting down of the complaint itself. On the one hand, PI, Shri Zala of Karelibaug Police Station, says that he registered the complaint when nobody was present and on the other hand, PSI, Shri Pawar of Panigate Police Station, states that complaint was registered by him. Thus, it creates doubt in the mind of all concerned as to who registered the complaint and where it was noted down and registered.

13. Apart from the above, Ahsanbhai is the partner of the deceased and all the three witnesses have categorically stated that except the above referred three witnesses, there were no other person who went to the scene of offence at the earliest after the incident. Abdulbhai Karimbhai has totally denied the same and was declared as hostile. Evidence of Sharadbhai, who is also an

interested witness now promoted as Manager of the Talkies, does not appear to be trustworthy as discussed above. As far as Ahsanbhai is concerned, his evidence is also not creating confidence in view of other evidence on record and also keeping in mind the way in which the officers has deposed. Ahsanbhai has been examined by the prosecution and he was thoroughly cross-examined by the learned counsel for the accused. There are materials on record raising doubt even about the presence of Ahsanbhai at the time of incident. Not only that, whether he went to the hospital along with Kanubhai or not was also not satisfactorily proved by the prosecution. As far as evidences of other witnesses upon which prosecution has placed reliance are concerned, it is stated that they have seen the accused coming out from the talkies and later on also, they have seen the accused as they were having the business very near to

the said talkies. However, they have not supported the say of the prosecution. Even recovery and discovery have not been proved. Moreover, nobody has stated to have seen the assailant.

14. In view of the aforesaid, it can be said that the reason for naming the present appellant as the accused appears to be that he was previously serving in the talkies as a Class IV employee (Sweeper). However, it may be noted that he was not serving there at the time of incident.

15. In absence of any evidence on record connecting the accused with the crime in question, we can safely hold that though the unfortunate incident of brutal murder of the deceased has taken place on broad day light in his office, none of the three persons who, according to the prosecution, were informed by the deceased by physical expression, have not come out with true version to support the case of the

prosecution. It is established that most of the witnesses are employees of the talkies or are closely connected with Ahsanbhai and all have become hostile and did not support the say of prosecution. Even accused's side has also tried to establish that there was dispute between Ahsanbhai and deceased Kanubhai regarding partnership business of talkies. When none of the witnesses have supported the case of the prosecution and also when there are no other evidences which could prove the guilt against the appellant accused, it cannot be said that it is the appellant-accused who has committed the crime in question. Hence, we hold that the offence in question has not been proved by the prosecution against the appellant and hence, the appellant should be acquitted giving benefit of doubt by setting aside the impugned judgment and order of conviction. We are therefore constrained to hold that the impugned judgment and order of

conviction delivered by the court below are unjust, improper and illegal warranting interference by this Court in this appeal.

16. This appeal is allowed. The impugned judgment and order passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.120 of 1995 on 8-9-1997 convicting the appellant under Sec.302 of IPC is quashed and set aside. The appellant-accused Arvind @ Anno Bhailal Solanki is ordered to be set at liberty forthwith, if not required in any other case.

(R.P.DHOLAKIA,J.)

(S.D.DAVE,J.)

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